IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 441 OF 2004

Shri Mohammed Usman H. Ustad ... Appellant

V/s

Smt. Fatimabi A. Gafur Ustad & ors. ... Respondents

Mr. A.A. Kumbhakoni for the appellant.

Mr. P.M. Pradhan with I.M. Khairdi for respondent No.1.

CORAM: P.V. KAKADE, J.

DATED: 17TH JUNE, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Solapur dated 18.11.2003 allowing the appeal and setting aside the order passed by the Jt. Civil Judge, Sr.Divn., Solapur , dated 11.1.2000 decreeing the suit for partition and separate possession of the suit properties to the respective sharers.

2. The plaintiff filed the suit for declaration that he had 2/10 share in the suit property and for partition and separate possession thereof and also for declaration

that the alienation in favour of defendant No.17 effected by defendant Nos. 1 to 7 is illegal when the said property was undivided and for share in the three shop premises situated at Siddheshwar Peth, Solapur and for other consequential reliefs.

3. The learned Trial Judge adjudicated the dispute on merits holding that the plaintiff had proved his pedigree and has further proved that deceased Hasansab was having landed property at village Sawanhalli, Tal. Bijapur and further that out of sale proceeds of landed property of said Hasansab, his sons purchased suit house bearing Nos. 172 and 145/5 situated at Solapur. It was further held that, out of sale proceeds of land of village Sawanhalli, Tal. Bijapur, sons of Hasansab purchased agricultural land bearing Nos. 175 and 176 at village Nandur, Tal. North Solapur. It was further held that the land at village Wangi was purchased in the name of deceased Abdul Gafur out of income derived from the joint family business of Abdul Gafur and his brothers and as such it was held that the property was available for partition and plaintiff had 2/10 share therein. The defendants' case that the entire landed property as well as house bearing No.172 of Guruwar Peth, Solapur was self acquired property of Abdul Gafur.

It was further held that, defendants failed to prove the partition and were non-suited on such grounds. The suit came to be decreed accordingly.

4. The appeal was carried to the District Court, Solapur. The learned Addl. District Judge, Solapur, after hearing both parties came to the conclusion that, on the basis of the plaintiff's evidence the appeal deserves to be allowed and the judgment and order passed by the lower Court was set aside and the suit came to be dismissed holding that the plaintiff failed to prove that the suit property was joint property of the parties and, therefore, the plaintiff was not entitled for partition.

5. I have heard the learned counsel for both sides. Perused the record.

6. The only substantial question of law sought to be raised on behalf of the appellant is to the effect that, whether the alleged admission of a supporting witness could bind the plaintiff and consequently non-suit the plaintiff only on that ground especially when the learned Trial Court has recorded its reason as to why such an admission is given by the alleged supporting defendant ?

In my considered view, on perusal of the judgments of the Courts below, it is to be noted that no substantial question of law is involved in this appeal and all the issues relating to the factum of alleged joint status of the property and requirement of partition were issues of fact and, therefore, it appears that the learned lower appellate Court Judge has rightly observed on the basis of plaintiff's evidence that the Trial Judge had erred in recording the findings in the aforesaid manner. It was further observed that the Trial Judge also committed an error in misinterpreting the provisions of Sec. 90 of the Indian Trusts Act which was made applicable to the case at hand by the learned Trial Judge. In my considered view, it may be noted that wrong appreciation of evidence on record would amount to substantial question of law, however, the admission given by the witness of the party can definitely be taken into account in the light of surrounding circumstances in order to adjudicate the dispute on merits which appears to be done by the learned appellate Court Judge and, therefore, such admission and insistence involved in this case would be binding on the parties and, therefore, the issues sought to be raised in that regard would not amount to the substantial question of law.

7. Time and again, the Apex Court has observed that, it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact, being the first appellate Court. This dicta would be applicable with force to the present case in the sense that it is found that the learned lower appellate Court Judge appears to have appreciated the entire evidence in just, proper and correct manner and, therefore, in my view, it would brook no interference.

8. In the result, the appeal stands dismissed with no order as to costs. Consequently, the Civil Application No. 407 of 2004 also stands dismissed.

(P.V. Kakade, J.)